Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Pacifica Broadcasting Company	)	
	)	EB-03-SE-289
	)	NAL/Acct. 200432100005
Licensee of Noncommercial Educational	)	Facility # 51241
Television Station KALO (TV), Honolulu,	)	FRN # 0004075040
Hawaii	)	
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: October 29, 2003 **Released: October 30, 2003**

By the Chief, Enforcement Bureau:

I. Introduction

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Pacifica Broadcasting Company ("Pacifica"), licensee of noncommercial educational television Station KALO (TV) (formerly KAIE (TV)), Honolulu, Hawaii, apparently violated section 301 of the Communications Act of 1934, as amended (the "Act")[1] and section 73.1690 of the Commission's rules[2] by willfully and repeatedly broadcasting from an unauthorized transmitter site. Based upon our review of the facts and circumstances of this case, we conclude that Pacifica is apparently liable for a monetary forfeiture in the amount of four thousand dollars ($4,000.00).

II. Background

2. On March 8, 2001, Pacifica filed an application with the Commission for a modified construction permit to relocate its station's transmitter from Wiliwilinui Ridge (the "Wiliwilinui Site"), from which it was authorized to operate, to Palikea Ridge (the "Palikea Site").[3] In October 2001, the Commission's Mass Media Bureau received an anonymous complaint that KALO (TV), Pacifica's station, was operating from the Palikea Site proposed in its then-pending modification application. On October 18, 2001, agents from the FCC's Honolulu Field Office took signal measurements of both sites. Those measurements confirmed that KALO (TV) was no longer operating from the authorized Wiliwilinui Site, but instead, was transmitting color bars from the proposed, but as yet unauthorized, Palikea Site. On October 19, 2001, one of the agents confirmed that the station's signal was originating from the Palikea Site. He contacted the

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1 47 U.S.C. § 301.

2 47 C.F.R. § 73.1690.

3 File No. BPET-20010308AAU.

Palikea Site manager by telephone, who confirmed that KALO (TV) was operating from a 10 foot container with a panel antenna mounted on an existing tower at the site. Shortly thereafter, an officer of Pacifica contacted the Mass Media Bureau's Video Services Division staff to report the unauthorized construction and to request orally special temporary authority ("STA") to permit the station to continue to operate at the Palikea Site. The FCC staff member informed the Pacifica caller that a written request for such an STA would be necessary.

3. A week after the field agent's initial visit to the station facilities, by letter to the Commission dated October 25, 2001, counsel for Pacifica admitted that Pacifica had removed the broadcasting equipment from the Wiliwilinui Site and had installed it at the Palikea Site, from which it had been testing the equipment and broadcasting color bars since the summer of 2001.[4] According to counsel's letter, during the summer of 2001, Pacifica's personnel had reviewed the station's outstanding authorizations, had found a construction permit specifying a transmitter site at the Palikea Site, and had erroneously assumed that the permit evidenced the FCC's grant of the still-pending modification application. Pacifica proceeded to install equipment at the Palikea Site, with the claimed belief that the Commission had authorized the installation. The station then initiated equipment tests, broadcasting color bars from the site.

4. According to counsel's letter, sometime thereafter, another Honolulu broadcaster informed "Pacifica that Pacifica's installation of equipment at Palikea had not been authorized" by the Commission.[5] Counsel represents that Pacifica then "doublechecked the station's authorization and determined, to its surprise, that the authorization which had previously been reviewed was a prior permit and that the above-referenced application had not theretofore been granted."[6] Counsel further represents that, upon learning that the FCC would not grant an STA to continue operations at the unauthorized site based upon an oral request, Pacifica immediately ceased broadcasting color bars and "began to make arrangements for the relocation of the station's equipment back to Wiliwilinui." [7] On October 30, 2001, counsel filed a written request for an STA to continue KALO (TV)'s operations at the Palikea Site, pending action on the modification application, claiming that reinstalling the equipment at the authorized Wiliwilinui Site "would impose a significant expense on Pacifica and would entail considerable logistical inconvenience."[8] On December 20, 2001, the Chief, Television Branch of the Video Services Division granted Pacifica's modification application to move the KALO (TV) transmitter to the Palikea Site, mooting the need for action on the STA request.

III. DISCUSSION

5. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a

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[4] *See* Letter for request for expedited action on application, dated October 25, 2001, from Harry F. Cole, counsel for Pacifica Broadcasting Company ("Cole Letter").

[5] *Id* at 2.

[6] *Id*.

[7] *Id.*

[8] *Id.* at 1.

forfeiture penalty.[9] In order to impose such a forfeiture penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed. The Commission will then issue forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.[10] As we set forth in greater detail below, we conclude under this standard that Pacifica is apparently liable for a forfeiture for its apparent willful and repeated violations of section 301 of the Act and section 73.1690(b)(2) of the Commission's rules.

6. Section 301 of the Act prohibits radio operation "except under and in accordance with this Act and with a license … granted under the provisions of this Act."[11] Section 73.1690(b)(2) of the Commission's rules, [12] which implements section 301 of the Act, provides that noncommercial educational broadcast stations must be operated in accordance with a proper authorization granted by the Commission and that changes to facilities such as the modification of the KALO (TV) site at issue here may only be made after the grant of a construction permit application submitted on FCC Form 340. Pacifica's admissions, coupled with the uncontroverted evidence that it installed and tested over several days KALO (TV)'s equipment at the Palikea Site in the absence of Commission authorization, lead to the conclusion that Pacifica apparently willfully and repeatedly violated section 301 of the Act and section 73.1690 of the rules.

7. **Forfeiture Amount.** The forfeiture guidelines establish a base forfeiture amount of four thousand dollars ($4,000.00) for constructing and operating facilities at an unauthorized location.[13] In assessing a forfeiture, the Commission also takes into account the statutory factors

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[9] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); s*ee also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" merely means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.,* 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.,* 16 FCC Rcd at 1362, ¶ 9.

[10] *See, e.g., SBC Communications, Inc*., *Apparent Liability for Forfeiture,* Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (forfeiture paid).

[11] 47 U.S.C. § 301.

[12] 47 C.F.R. § 73.1690(b)(2). This rule requires prior approval of any change in station geographic coordinates of more than 3 seconds latitude and/or 3 seconds longitude. The move of the KALO (TV) transmitter site at issue here substantially exceeded those parameters.

[13] *In the Matter of the Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

set forth in section 503(b)(2)(D) of the Act,[14] including the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay and such other matters as justice requires. Under the circumstances, we believe a forfeiture of four thousand dollars ($4,000.00) is apparently warranted.

IV. ORDERING CLAUSES

8. Accordingly, pursuant to section 503(b) of the Communications Act of 1934, as amended, and section 1.80 of the Commission's rules, [15] Pacifica Broadcasting Company is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of four thousand dollars ($4,000.00) for its willful and repeated violation of section 301 of the Act and section 73.1690 of the Commission's rules.[16]

9. Therefore, IT IS HEREBY ORDERED, pursuant to section 1.80 of the Commission's Rules that within thirty (30) days of the release date of this Notice, Pacifica Broadcasting Company SHALL PAY the full amount of the proposed forfeiture or shall file a written statement seeking reduction or cancellation of the proposed forfeiture.[17]

10. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. The payment must include the FCC Registration Number (FRN) referenced above and must also note the NAL/Acct Number referenced above.

11. The response, if any, MUST BE MAILED to Joseph P. Casey, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Room 7-A843, Washington, D.C. 20554 and MUST INCLUDE the NAL/Acct. Number referenced above.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. Requests for payment of the full amount of the forfeiture proposed in this NAL under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, SW, Washington, DC 20554.[18]

14. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116

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[14] 47 U.S.C. § 503(b)(2)(D).

[15] 47 U.S.C. § 503(b), 47 C.F.R. § 1.80.

[16] 47 U.S.C. § 301, 47 C.F.R. § 73.1740.

[17] 47 C.F.R. § 1.80.

[18] 47 C.F.R. § 1.1914.

Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If Pacifica qualifies as a small entity and if it wishes to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in its response to the NAL or in a separate filing to be sent to the Investigations and Hearings Division. Its certification should indicate whether Pacifica, including its parent entity and its subsidiaries, meets one of the definitions set forth in the list provided by the FCC's Office of Communications Business Opportunities ("OCBO") set forth in the Attachment to this NAL. This information will be used for tracking purposes only. Pacifica's response or failure to respond to this question will have no effect on its rights and responsibilities pursuant to section 503(b) of the Communications Act. If Pacifica has questions regarding any of the information contained in the Attachment, it should contact OCBO at (202) 418-0990.

15. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability For Forfeiture shall be sent, by Certified Mail Return Receipt Requested, to Pacifica Broadcasting Company 875 Waimanu Street, Suite 110, Honolulu, HI. 96813, and a copy to its counsel, Harry F. Cole, Esq., Fletcher, Heald & Hildreth, 11th Floor, 1300 North 17th Street, Arlington, Virginia 22209-3801.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

October 2002

ATTACHMENT

FCC List of Small Entities

As described below, a "small entity" may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.
(2) Small Governmental Jurisdiction
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.
(3) Small Business
Any business concern that is independently owned and operated and is not dominant in its field, *and* meets the pertinent size criterion described below.

Industry Type	Description of Small Business Size Standards
Cable Services or Systems	
Cable Systems	Special Size Standard – **Small Cable Company** has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	$12.5 Million in Annual Receipts or Less
Open Video Systems	
Common Carrier Services and Related Entities	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

International Services	
International Broadcast Stations	

International Public Fixed Radio (Public and Control Stations)	$12.5 Million in Annual Receipts or Less
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
Mass Media Services	
Television Services	$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	Auction Special Size Standard – **Small Business** is less than $40M in annual gross revenues for three preceding years
Wireless and Commercial Mobile Services	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - **Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and controlling principals) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHZ Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - **Small Business** is $40M or less in annual gross revenues for three previous calendar years **Very Small Business** is average gross revenues of $15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - **Small Business** is $15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer

Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	
Public Safety Radio Services	**Small Business** is 1,500 employees or less **Small Government Entities** has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	**Small Business** is $40M or less average annual gross revenues for three preceding years **Very Small Business** is average gross revenues of $15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – **Small Business** is $40M or less average annual gross revenues for three preceding calendar years Prior to Auction – **Small Business** has annual revenue of $12.5M or less
Multichannel Multipoint Distribution Service	$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – **Small Business** is $40M or less average annual gross revenues for three preceding years **Very Small Business** is average gross revenues of $15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – **Small Business** is an entity that, together with its affiliates, has no more than a $6M net worth and, after federal income taxes (excluding carryover losses) has no more than $2M in annual profits each year for the previous two years New Standard – **Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	**Small Business** is average gross revenues of $15M or less for the preceding three years (includes affiliates and persons or entities that

	hold interest in such entity and their affiliates) **Very Small Business** is average gross revenues of $3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	$29 Million in Annual Receipts or Less
Nursing Homes	$11.5 Million in Annual Receipts or Less
Hotels and Motels	$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)